

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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LARRY CALDWELL,

Plaintiff,

v.

NO. CIV. S-05-0061 FCD JFM

MEMORANDUM AND ORDER

ROSEVILLE JOINT UNION HIGH  
SCHOOL DISTRICT; JAMES JOINER  
and R. JAN PINNEY, in their  
official capacities as members  
of the Board of Education;  
TONY MONETTI in his official  
capacity as Assistant  
Superintendent for Curriculum  
and Instruction, DONALD  
GENASCI in his official  
capacity Deputy Superintendent  
for Personnel and Chief  
Compliance Officer; RONALD  
SEVERSON in his official  
capacity Principal of Granite  
Bay High School; and Does 1  
through 10.

Defendants.

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1 This matter is before the court on plaintiff's ex parte  
2 application for a continuance of the court's ruling on the  
3 parties' cross-motions for summary judgment to permit plaintiff  
4 to conduct limited discovery pursuant to Federal Rule of Civil  
5 Procedure 56.<sup>1</sup> On September 22, 2006, the court entered a  
6 Pretrial Scheduling Order ("PSO") in this matter. The PSO  
7 reflected the agreements made in the parties' delayed Joint  
8 Status Report, filed September 20, 2006. Specifically, the PSO  
9 provides that formal discovery is deferred until after the court  
10 has ruled on the parties' respective Rule 56 motions. On  
11 November 1, 2006, the parties filed cross-motions for summary  
12 judgement. On December 1, 2006, the court heard oral argument on  
13 the matter. On December 4, 2006, as a result of comments made by  
14 the court at the hearing, plaintiff filed an ex parte application  
15 to file supplemental briefing and for the court to defer ruling  
16 on the cross-motions for summary judgment until the plaintiff has  
17 conducted limited discovery. However, plaintiff did not file the  
18 requisite affidavit provided for in Rule 56(f). Therefore, the  
19 court ordered plaintiff to resubmit his ex parte application with  
20 the requisite supporting documents and granted defendants time to  
21 oppose plaintiff's application. Defendants oppose plaintiff's  
22 application.

23 When a party opposing a motion for summary judgment cannot  
24 present "facts essential to justify his opposition" to the  
25 motion, Rule 56(f) permits the party to submit an affidavit  
26 setting forth the reasons and requesting that the court continue

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27 <sup>1</sup> All further references to a "Rule" are to the Federal  
28 Rules of Civil Procedure.

1 or deny the motion to permit the opposing party to discover those  
2 essential facts. Garrett v. City and County of San Francisco,  
3 818 F.2d 1515, 1518 (9th Cir. 1987) (quoting Hancock v.  
4 Montgomery Ward Long Term Disability Trust, 787 F.2d 1302, 1306  
5 (9th Cir. 1986)). The burden is on the party seeking the  
6 continuance to demonstrate that the information sought exists,  
7 and that it would raise an issue of material fact foreclosing  
8 summary judgment. Nidds v. Schindler Elevator Corp., 113 F.3d  
9 912, 921 (9th Cir. 1997) (citations omitted); Continental  
10 Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades  
11 Dist. Council, 817 F.2d 1391, 1395 (9th Cir. 1987). However,  
12 "where. . . no discovery whatsoever has taken place, the party  
13 making a Rule 56(f) motion cannot be expected to frame its motion  
14 with great specificity as to the kind of discovery likely to turn  
15 up useful information, as the ground for such specificity has not  
16 yet been laid." Burlington N. Santa Fe R.R. Co. v. Assiniboine  
17 and Sioux Tribes, 323 F.3d 767, 774 (9th Cir. 2003).

18 The court should deny or defer summary judgment where the  
19 opposing party demonstrates that it has not had sufficient time  
20 to discover facts essential to justify the party's opposition.  
21 Rule 56(f) motions "'should be granted almost as a matter of  
22 course' unless 'the nonmoving party has not diligently pursued  
23 discovery of the evidence.'" Wichita Falls Office Assoc. v. Banc  
24 One Corp., 978 F.2d 915, 919 n.4 (5th Cir. 1992) (quoting  
25 International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257,  
26 1267 (5th Cir. 1991)); Burlington, 323 F.3d at 773; see also  
27 Qualls v. Blue Cross of California, 22 F.3d 839, 844 (9th Cir.  
28 1994).

1 The Ninth Circuit has found that both "implication and logic  
2 require that a Rule 56(f) motion be made prior to the summary  
3 judgment hearing." Ashton-Tate Corp. v. Ross, 916 F.2d 516, 520  
4 (9th Cir. 1990). "[T]he process of evaluating a summary judgment  
5 motion would be flouted if requests for more time, discovery, or  
6 the introduction of supplemental affidavits had to be considered  
7 even if requested well after the deadline set for the  
8 introduction of all information needed to make the ruling has  
9 passed." Id. (citing Pfeil v. Rogers, 757 F.2d 850, 858 (7th  
10 Cir. 1985)).

11 According to the Ninth Circuit's holding in Ross,  
12 plaintiff's Rule 56(f) application is untimely. However, the  
13 facts of this case pose a different circumstance than that in  
14 Ross, namely because the parties agreed and the court ordered  
15 formal discovery deferred until after the court ruled on the  
16 parties' Rule 56 motions. As such, plaintiff has had no  
17 opportunity to conduct formal discovery in this case. Therefore,  
18 the court will not bar plaintiff's application as untimely.<sup>2</sup>

19 Plaintiff has met the requirements of Rule 56(f) by  
20 submitting a declaration outlining three facts for which he would  
21 requests to conduct discovery. (See Decl. of Larry Caldwell,  
22 filed Dec. 7, 2006). These facts relate to whether plaintiff  
23 complied with the notice requirement to place items on the agenda  
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25 <sup>2</sup> However, the court admonishes plaintiff for his failure  
26 to bring this motion prior to the hearing on cross-motions for  
27 summary judgment. By his delay, plaintiff has not only  
28 squandered both his and defendants' time and resources through  
the parties' preparation and submission of lengthy briefs and  
exhibits, but also wasted judicial resources and created a  
circumstance that leads to vastly inefficient case management.

1 of school board meetings and whether defendants made admissions  
2 regarding the exclusion of plaintiff's policies in various fora  
3 based on viewpoint. These facts are highly relevant to  
4 plaintiffs' claims. Further, the court is hesitant to rule on  
5 dispositive motions in a case bearing on such fundamental rights  
6 guaranteed by the First and Fourteenth Amendments without  
7 allowing plaintiff at least the limited discovery he seeks  
8 through this motion.

9 Therefore, plaintiff's ex parte application under Rule 56(f)  
10 is GRANTED. The parties have ninety (90) days from the date of  
11 this order to conduct discovery. The parties shall submit any  
12 supplemental briefing, not to exceed fifteen (15) pages, by April  
13 13, 2007. The parties shall submit supplemental reply briefs,  
14 not to exceed five (5) pages, by April 20, 2007. The court will  
15 hold further hearing on this matter on April 27, 2007 at 10:00  
16 a.m. All current dates as set in the PSO are hereby VACATED.  
17 The court shall reset the dates as needed after it issues its  
18 ruling on the parties' cross-motions for summary judgment.

19 IT IS SO ORDERED.

20 DATED: December 18, 2006

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25 FRANK C. DAMRELL, JR.  
26 UNITED STATES DISTRICT JUDGE  
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